STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6922

Petition of Waitsfield-Fayston Telephone	)	
Company, Inc., to Establish a Rate for	)	Hearing at
Rental of Space on Poles Owned by	)	Montpelier, Vermont
Green Mountain Power Corporation	)	June 8, 2004

Order entered: 2/3/2005

PRESENT: John P. Bentley, Esq.
Hearing Officer

APPEARANCES: Paul J. Phillips, Esq.
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I. INTRODUCTION

Today I recommend that the Public Service Board ("Board") set a rate, pursuant to revised Board Rule 3.700, of $16.00 per pole per year for attachments made by Waitsfield-Fayston Telephone Company, Inc., d/b/a Waitsfield Telecom, d/b/a Waitsfield Cable and d/b/a Champlain Valley Telecom ("WFTC"), to poles owned by Green Mountain Power Corporation ("GMP"). I also recommend that the Board make this rate effective as of January 1, 2002, for Champlain Valley Telecom and as of February 13, 2003, for Waitsfield Telecom, and that the Board order GMP to refund an amount, which WFTC will hereafter calculate, representing payments made by WFTC to GMP in excess of the $16.00 yearly rate since those dates (less certain offsets described below). I also recommend that GMP refund to WFTC an amount, which WFTC will hereafter calculate, representing payments made by WFTC to GMP for make-ready work. Finally, I recommend that the Board order GMP to amend its pole-attachment tariffs so as to grant non-discriminatory access to its poles to every type of Attaching Entity, as defined in Board Rule 3.700, that is given a right of attachment under that Rule.

A. Procedural History

On December 30, 2003, WFTC, pursuant to 30 V.S.A. § 208 and Rules 2.202, 3.701(A), 3.704(B), 3.704(C), 3.706(A)(2), and 3.710(A) of the Board petitioned the Board to set a rental rate for WFTC's attachments to utility poles owned, in whole or in part, by GMP. WFTC also asked the Board to order GMP to refund to WFTC an amount representing alleged overpayments of rental charges paid by WFTC to GMP; and to hold GMP in violation of Board Rules 3.701(A), 3.703(A), and 3.703(B) because GMP has filed pole-attachment tariffs that fail to set rates, terms, and conditions for the rental of space on GMP's poles by WFTC and other incumbent local exchange carriers ("ILECs").

A prehearing conference was conducted in this matter on February 20, 2004. On February 27, 2004, Central Vermont Public Service Corporation ("CVPS") moved to intervene in this proceeding. CVPS's motion was opposed by WFTC and supported by GMP; the Department of Public Service ("Department") remained neutral on the CVPS motion. On March 25, 2004, I

denied CVPS's motion to intervene but allowed CVPS the opportunity to file a post-hearing brief as an amicus curiae. On June 8, I granted a Motion for Limited Participation filed by Adelphia Cable Communications, Inc. ("Adelphia") and the New England Cable Television Association ("NECTA") and thereby permitted Adelphia and NECTA the opportunity to file post-hearing briefs in this matter as amici curiae.

On March 9, 2004, WFTC and GMP submitted a Stipulation of Facts ("Stip.") in which the stipulating parties agreed as to the existence, relevance, and admission into evidence of certain of the facts at issue in this proceeding.

WFTC and GMP submitted prefiled direct and prefiled rebuttal testimonies. On April 27, 2004, the Department objected to the admissibility of certain portions of GMP's prefiled direct testimony. I overruled the Department's objection by Procedural Order issued on May 27, 2004. A technical hearing in this matter was held on June 8, 2004, at which, inter alia, the Stipulation of Facts was admitted into evidence.

B. Legal Setting

This case presents the first opportunity for the Board to use revised Board Rule 3.700 to resolve a pole-rental rate dispute between an ILEC and an electric utility.

In 2001, the Board amended its original Rule 3.700, which, upon adoption in 1984, had applied only to the attachment of cable-television facilities to utility poles in Vermont. In revising Rule 3.700, the Board created a right of attachment for all utilities in Vermont, including, without limitation, ILECs, competitive local exchange carriers ("CLECs"), electric utilities, and cable television providers.[1] The revised Rule neatly divides the pole-attachment world into two categories: Pole-Owning Utilities are public service companies that are subject to Board regulation and that have an ownership interest in utility poles or rights-of way;[2] and Attaching Entities are entities holding a certificate of public good issued by the Board and that

1. *See* Rule 3.707(A) (Right of Access); *see also* exh. DPS-3 (Board Rule 3.700, Policy Statement and Summary of Comments) ("Policy Statement"), at 1 (revised Rule requires pole owners to permit attachments by CLECs, as well as by ILECs and electric utilities that are unable to reach voluntary agreements with pole owners) and at 17 (unlike the federal statute and rules, the Board's revised Rule creates a right of attachments by ILECs and electric utilities).

2. Board Rule 3.702(F).

seek to attach (or have attached) a facility of any type to a pole or right-of-way for the purpose of providing service to one or more customers.[3] The Rule expressly defines "Attaching Entity" to include, without limitation, "telecommunications providers, cable television service providers, incumbent local exchange carriers, electric utilities, and governmental entities."[4]

The revised Rule also creates distinctions between categories of Attaching Entities, in a way that is relevant to the resolution of this proceeding. First, the Rule establishes a formula for calculating the pole-rental rate that is to be included in the tariffs of Pole-Owning Utilities.[5] Under the Rule, the annual rental rate per pole is calculated with this formula:

$$\begin{bmatrix}\text{Annual}\\ \text{Rental}\\ \text{per Pole}\end{bmatrix} = \left[\frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}}\right] \times \begin{bmatrix}\text{Net}\\ \text{Investment}\\ \text{per Pole}\end{bmatrix} \times \begin{bmatrix}\text{Carrying}\\ \text{Cost}\\ \text{Ratio}\end{bmatrix}$$

The terms used in the formula are defined in Board Rule 3.706(D). Notably for the purposes of the present proceeding, the term "Space Occupied by Attachment" is defined as follows:

> (a) If the Pole-Owning Utility has conducted a study of the space actually occupied by a particular type of attachment (including safety space) on the Pole-Owning Utility's poles, then an amount defined in a tariff, but in no event less than the amounts specified in paragraph (b) below.
> (b) Otherwise, the following quantities:
> (i) 1.0 foot for Attaching Entities that are cable television operators and that do not provide local exchange telephone service; and
> (ii) 2.0 feet for all other Attaching Entities except incumbent local exchange carriers and electric utilities.[6]

The revised Rule thus excludes ILECs and electric utilities from the presumptions that a Pole-Owning Utility is otherwise permitted to use, in lieu of a pole survey, to establish the "Space Occupied by Attachment" for tariffing purposes.

While omitting ILECs and electric utilities from presumptions as to occupied space, the revised Rule creates a separate presumption in favor of negotiated contracts for pole-attachment

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3. Board Rule 3.702(B).
4. *Id.*
5. Board Rule 3.706(C).
6. Board Rule 3.706(D)(1).

rental rates between ILECs and electric utilities. First, the Rule expressly protects existing contracts between ILECs and electric utilities:

> Unless the Board rules to the contrary in a particular case, rates under this section do not apply where the rights of the Attaching Entity and the Pole-Owning Utility are defined by a contract (including a Joint Ownership Agreement or Joint Use Agreement).[7]

The Rule further provides that "[u]nexpired contracts on the effective date of this Rule between Attaching Entities and Pole-Owing Utilities shall remain in effect until they expire according to their terms."[8] In its accompanying Policy Statement, the Board explained:

> [T]he Board has limited the effect of the formula in the Final Proposed Rule by not applying it to existing pole maintenance agreements between ILECs and power companies. For example, neither the joint ownership agreement between Green Mountain Power Corporation ("GMP") and Verizon-Vermont, nor the joint use agreement between Central Vermont Public Service ("CVPS") and Verizon-Vermont would be displaced by the Final Proposed Rule.[9]

The Board nonetheless expressly reserved its authority to "investigate the terms and rental rate of any proposed or existing contract between Attaching Entities, and Pole-Owning Utilities," and provided that, "[w]here the public interest so requires, the Board may order that terms or rates be modified."[10] However, the Rule is silent as to what standards or methods the Board should use to modify an existing contract when the public interest requires such modification.

For proposed contracts, the Rule requires the Board, pursuant to 30 V.S.A. § 229, to review and approve any pole-attachment contract that purports to take effect after the effective date of the Rule.[11]

In situations involving an expiring or expired agreement, the revised Rule provides as follows:

> When a pole attachment contract has expired or is about to expire, and an Attaching Entity cannot reach agreement on a rental rate with the Pole-

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7. Board Rule 3.706(A)(1).
8. Board Rule 3.704(A)(2).
9. Policy Statement (Exhibit DPS-3), above, at 3.
10. Board Rule 3.704(B).
11. Board Rule 3.704(A)(1).

> Owning Utility, any party may petition the Board to set an attachment rate. In reaching a decision the Board may consider the terms and conditions of previous contracts between the parties and the rental calculation in section 3.706.[12]

Similarly, in situations in which an ILEC or an electric utility is negotiating a new agreement with a Pole-Owning Utility, the Rule provides that:

> Where an electric utility or an incumbent local exchange carrier cannot reach agreement on a rental rate with the Pole Owner, either party may petition the Board to set a rate. The Board may consider the terms and conditions of any previous attachment or joint-use contracts between the parties in setting a rate not inconsistent with the principles of this Rule.[13]

Given these various provisions concerning the legal rights and legal presumptions affecting ILECs and electric utilities, the revised Rule unfortunately creates some ambiguity, and a good deal of confusion, for the present proceeding. The revised Rule makes clear that WFTC, as an Attaching Entity, has a right of attachment to GMP's poles. But WFTC is also an incumbent local exchange carrier,[14] for whom certain provisions of revised Rule 3.700 have an as-yet undetermined application. Accordingly, to resolve WFTC's requests for relief, the Board must consider at least some of the following questions:

- Whether existing pole-attachment contracts between WFTC and GMP are still in effect, or whether they have expired or been terminated.
- Assuming that the pole-attachment contracts between WFTC and GMP are no longer in effect and that the Board must set an attachment rate to be paid by WFTC to GMP, then
  - what weight, if any, the Board should give to previous attachment contracts between the parties; and
  - how, if at all, the Board should apply the Rule 3.706 formula to an incumbent local exchange carrier such as WFTC.
- Assuming the Rule 3.706 formula applies to WFTC, how the Board should calculate each element of the rate formula:
  - Space Occupied by Attachment
  - Total Usable Space

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12. Board Rule 3.704(C).
13. Board Rule 3.706(A)(2).
14. See Finding 9, below.

- Net Investment per Pole
- Carrying Cost Ratio

- What role, if any, GMP's tariffed pole-attachment rate(s) should have on the Board's calculation of an appropriate pole-attachment rate to be paid by WFTC.

Pursuant to 30 V.S.A. § 8, and based on the record and evidence before me, I present the following findings of fact and conclusions of law to the Board; proposed findings inconsistent with the following are hereby rejected.

II. FINDINGS

A. The Parties and Their Contractual History

(1) General Facts

1. WFTC, a Vermont corporation with a principal place of business in Waitsfield, Vermont, is a public utility holding a Certificate of Public Good, issued by the Board under 30 V.S.A. § 231, authorizing WFTC to offer telecommunications service to the public on a common carrier basis; and a Certificate of Public good, issued by the Board under 30 V.S.A. § 504, authorizing WFTC to operate a cable television system. Stip. ¶ 1, at 2.

2. GMP, a Vermont corporation with a principal place of business in Colchester, Vermont, is an electric utility regulated by the Board. Stip. ¶ 2, at 2.

3. WFTC, doing business as Waitsfield Telecom, provides telecommunications services, including, without limitation, local exchange telephone service, to residential and business customers residing in the Waitsfield exchange (496 and 583). Stip. ¶ 3, at 2.

4. WFTC, doing business as Waitsfield Cable, provides cable television services to subscribers in the towns of Waitsfield, Warren, Fayston, Moretown, and a portion of Duxbury. Stip. ¶ 4, at 2.

5. WFTC, doing business as Champlain Valley Telecom, provides telecommunications services, including, without limitation, local exchange telephone service, to residential and business customers residing in the following exchanges: Addison (759); Bridport (758); Bristol (453); Charlotte (425); Hinesburg (482); Panton (475); Richmond (434); and Weybridge (545). Stip. ¶ 5, at 2–3.

6. As part of its telecommunications network, WFTC attaches its facilities to poles solely owned by GMP and to poles jointly owned by GMP and WFTC for the purpose of delivering telecommunications services to WFTC's telephone customers in both the Waitsfield Telecom and Champlain Valley Telecom service areas, and for the purpose of delivering cable television services to Waitsfield Cable's customers in the Waitsfield Cable service area. Stip. ¶ 6, at 3.

7. GMP is a "Pole-Owning Utility," as defined in PSB Rule 3.702(F). Stip. ¶ 7, at 3.

8. WFTC is an "Attaching Entity," as defined in PSB Rule 3.702(B). Stip. ¶ 8, at 3.

9. WFTC is an "incumbent local exchange carrier," as that term is used in Rule 3.700. Stip. ¶ 9, at 3.

10. On or about November 30, 2001, GMP filed proposed pole-attachment tariffs in compliance with Revised Rule 3.700 of the Board, which had become effective on September 1, 2001. Stip. ¶ 10, at 3; exh. Joint-1.

11. The Board opened Docket 6609 for the purpose of investigating the rates and terms of GMP's proposed pole-attachment tariffs. *See In re: Tariff Filings of Green Mountain Power Corp. re: Proposed Pole Attachment Tariffs*, Docket 6609, Order Allowing Tariffs to Take Effect Subject to Investigation and Notice of Prehearing Conference (Dec. 31, 2001) ("Conditional Approval Order"), at 2.

12. Under Rule 3.711, new pole rental rates under the tariffs filed were to become effective on January 1, 2002. Stip ¶ 11, at 3–4.

13. By Order dated December 31, 2001, the Board granted conditional approval to GMP's new pole-attachment tariffs[15], pending the outcome of the investigation in Docket 6609. Stip. ¶ 12, at 4.

14. On or about August 8, 2003, GMP, NECTA, and the Department filed a Stipulation in Docket 6609 which recommended that the Board approve the rates specified in the Stipulation. Stip. ¶ 13, at 4; exh. Joint-2.

15. On October 29, 2003, the Board, by Final Order entered in Docket 6609, approved the Stipulation, and held that the resulting pole-attachment rates are just and reasonable and are

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15. Those tariffs provide for an annual rate of $8.00 for a one-foot attachment and $16.00 for a two-foot attachment.

consistent with the principles of Boards Rule 3.700. The Board ordered GMP to file revised tariffs incorporating the rates contained in the Stipulation within 30 days from the date of the Order. See Docket 6609, Order (Oct. 29, 2003) ("GMP Approval Order"). Stip. ¶ 14, at 4.

16. On November 29, 2003, GMP filed two separate revised tariffs pursuant to the GMP Approval Order. Corrections to those tariffs were filed on December 14, 2003. Stip. ¶ 15, at 4; exh. Joint-3.

17. The GMP compliance tariffs provide that a cable television company that does not provide local exchange telephone service will pay a rate of $8.00 per pole per year for its attachments to GMP poles; and that all other Attaching Entities except incumbent local exchange carriers and electric utilities will pay a rate of $16.00 per pole per year for their attachments to GMP poles. Tr. at 81, lines 21–25, and at 82, lines 1–3 (Ferguson). Although the attachment rates approved in Docket 6609 resulted from a stipulated, bottom-line settlement among the parties, the $8.00 rate is based on one foot of occupied space and the $16.00 rate is based on two feet of occupied space. Tr. at 109, lines 18–22 (Ferguson).

18. Because the GMP tariffed rates are based on the Rule 3.700 occupied-space presumptions multiplied by a per-foot tariffed rate, GMP could have filed a single tariff stating that the pole rental rate was calculated per foot of occupied space, instead of filing two separate tariffs that included certain Attaching Entities and excluded others. Tr. at 109, lines 23–25, and at 110, lines 1–6 (Ferguson).

(2) Waitsfield Telecom/Waitsfield Cable and GMP

19. By letter dated December 19, 1983, prepared and signed by GMP's corporate counsel and countersigned as of February 6, 1984, by WFTC's duly authorized agent, WFTC and GMP entered into a "Pole Rental Agreement" (the "Waitsfield Agreement"). Stip. ¶ 16, at 5; exh. Joint-4.

20. By its express terms, the Waitsfield Agreement "briefly summarizes the agreement [GMP and Waitsfield] have reached on charges by Green Mountain Power Corporation ("GMP") for poles on which Waitsfield-Fayston Telephone Company ("Waitsfield") rents space for telephone and cable television attachments." Exh. Joint-4; tr. at 172, lines 5–11 (Owen).

21. The Waitsfield Agreement did not state any limitation or condition on the term "charges," as that term is used in the Waitsfield Agreement. Exh. Joint-4; tr. at 172, lines 12–15 (Owen).

22. The Waitsfield Agreement made no separate provision for make-ready, survey work, or labor. Exh. Joint-4; tr. at 89, lines 9–18 (Ferguson).

23. Waitsfield's understanding was that the rental rate established in the 1983 Waitsfield Agreement was intended to cover all pole attachment charges, including make-ready charges. Tr. at 170, lines 2–7 (Owen).

24. Waitsfield has paid "hundreds of thousands of dollars" in make-ready charges to GMP since the early 1990s. Tr. at 168, lines 13–16, and at 170, lines 12–14 (Owen).

25. Waitsfield has paid make-ready charges to GMP under protest in order to provide service to Waitsfield's customers, because GMP has made clear that if Waitsfield does not pay the charges, the make-ready will not be done and Waitsfield will not be able to provide the services needed by its customers. Tr. at 168, lines 23–24, and at 170, lines 18–24 (Owen).

26. The rental rate calculated under the methodology in the Waitsfield Agreement assumed that Waitsfield would pay 50% of GMP's per-pole operating costs (relevant investment per pole multiplied by a per-pole carrying charge). The initial calculation established Waitsfield's portion of the operating cost at $18.10 per pole, subject to a "phase-in factor" over the first two years of the Waitsfield Agreement. Charges for 1984 and subsequent years were to be calculated under the same formula using "updated investment and costs data." Stip. ¶ 17, at 5.

27. There is no record that the Waitsfield Agreement was ever amended or further defined. Stip. ¶ 18, at 5.

28. The 1983 Waitsfield Agreement specified that "[t]he support for these [rate calculation] numbers accompanied [an] October 14, 1983, letter" from GMP's corporate counsel to WFTC; however, no such letter is attached to the Waitsfield Agreement and no party has produced the specified letter. Exh. Joint-4; tr. at 91, lines 11–25, and at 92, lines 1–16 (colloquy between Hearing Officer and counsel for GMP and WFTC).

29. The annual pole-rental charged by GMP to Waitsfield under the Waitsfield Agreement has increased over time so that, by calendar year 2002, the annual pole-rental rate was $35.19 per pole ($8.80 per pole quarterly). Stip. ¶ 19, at 5.

30. The $35.19 rate that GMP charges to WFTC is the highest pole-rental rate that GMP charges any Attaching Entity in the State. Tr. at 106, lines 6–8 (Ferguson).

31. GMP is not aware of any Pole-Owning Utilities in the State of Vermont that charge pole-attachment rates higher than the $35.19 rate that GMP charges to Waitsfield. Tr. at 81, lines 15–18 (Ferguson).

32. Waitsfield continued to make pole-rental payments to GMP in 2002 at the $35.19 rate as determined using the Waitsfield Agreement. Stip. ¶ 20, at 5.

33. There was no provision of the Waitsfield Agreement concerning termination, nor was there a provision barring termination. Tr. at 43, lines 4–13 (Owen).

34. By letter dated February 13, 2003, Waitsfield notified GMP that the Waitsfield Agreement was terminated, effective January 1, 2002, and that Waitsfield believed the rental rate should be "the annual rate established in Green Mountain Power's new tariff," which Waitsfield further identified as being "the compliance pole attachment tariff that Green Mountain Power filed on November 30, 2001 (still pending in Docket 6609)." Stip. ¶ 21, at 6; exh. Joint-5.

35. Calendar Year 2002: In 2002 Waitsfield made payments to GMP totaling $136,726.26, representing pole rental charges paid on a quarterly basis, as follows:

a. By quarterly invoice dated February 26, 2002, for the first quarter of 2002, GMP billed Waitsfield a net total of $34,587.37, representing pole-rental fees calculated at a quarterly rate of $8.80 per pole ($35.19 per year); after agreeing with GMP to resolve a minor discrepancy in the pole count, Waitsfield paid GMP quarterly rent in the amount of $34,059.45 for Waitsfield's attachments to 3,871 GMP poles. Stip. ¶ 22a, at 6; exh. WFTC-4A.

b. By quarterly invoice dated June 12, 2002, for the second quarter of 2002, GMP billed Waitsfield a net total of $34,393.83, representing pole-rental fees calculated at a quarterly rate of $8.80 per pole ($35.19 per year); after agreeing with GMP to resolve a minor discrepancy in the pole count, Waitsfield paid GMP quarterly rent in the amount of $34,222.27 for Waitsfield's attachments to 3,890 GMP poles. Stip. ¶ 22b, at 6; exh. WFTC-4B.

c. By quarterly invoice dated August 20, 2002, for the third quarter of 2002, GMP billed Waitsfield a net total of $34,349.84, representing pole-rental fees

calculated at a quarterly rate of $8.80 per pole ($35.19 per year); after agreeing with GMP to resolve a minor discrepancy in the pole count, Waitsfield paid GMP a total of $34,222.27 for Waitsfield's attachments to 3,890 GMP poles. Stip. ¶ 22c, at 6–7; exh. WFTC-4C.

d. By quarterly invoice dated October 2, 2002, for the fourth quarter of 2002, GMP billed Waitsfield a net total of $34,226.64, representing pole-rental fees calculated at a quarterly rate of $8.80 per pole ($35.19 per year); after agreeing with GMP to resolve a minor discrepancy in the pole count, Waitsfield paid GMP a total of $34,222.27 for Waitsfield's attachment to 3,890 GMP poles. Stip. ¶ 22d, at 7; exh. WFTC-4D.

36. Calendar Year 2003: In 2003, GMP invoiced Waitsfield for pole-rental charges totaling $137,337.77 and Waitsfield made payments to GMP totaling $69,777.64, as follows:

a. By invoice dated January 27, 2003, GMP billed Waitsfield a net total of $34,349.84, representing pole-rental fees for the First Quarter of 2003, calculated at a quarterly rate of $8.80 per pole. By invoice dated March 7, 2003, GMP billed Waitsfield a net total of $34,332.24, representing pole-rental fees for the Second Quarter of 2003, calculated at a quarterly rate of $8.80 per pole. Together with its letter dated April 17, 2003, Waitsfield made payment to GMP in the amount of $38,561.64, representing pole-rental charges for the First Quarter of 2003 ($19,285.76 for Waitsfield's attachment on 3,904 poles solely-owned by GMP) and for the Second Quarter of 2003 ($19,275.88 for Waitsfield's attachments on 3,902 poles solely-owned by GMP) at a quarterly rate of $4.94 per pole (assuming two feet of occupied space per pole). Stip. ¶ 23a, at 7–8; exh. Joint-6.

b. By quarterly invoice dated May 29, 2003, for the Third Quarter of 2003, GMP billed Waitsfield a net total of $34,332.24, representing pole-rental fees calculated at a quarterly rate of $8.80 per pole. On or about June 13, 2003, Waitsfield paid GMP for the Third Quarter of 2003 a total of $15,608.00 for Waitsfield's attachments to 3,902 poles solely-owned by GMP, which WFTC calculated at a quarterly rate of $4.00 per pole (assuming two feet of occupied space per pole). Stip. ¶ 23b, at 8.

c. By quarterly invoice dated September 5, 2003, for the Fourth Quarter of 2003, GMP billed Waitsfield a net total of $34,323.45, representing pole-rental fees calculated at a quarterly rate of $8.80 per pole. On or about September 18, 2003, Waitsfield paid GMP for the Fourth Quarter of 2003 a total of $15,608.00 for Waitsfield's attachments to 3,902 poles solely-owned by GMP, which WFTC calculated at a quarterly rate of $4.00 per pole (assuming two feet of occupied space). Stip. ¶ 23c, at 8.

37. Year-to-Date 2004: By quarterly invoice dated February 3, 2004, for the First Quarter of 2004, GMP billed Waitsfield a net total of $34,358.64, representing pole-rental fees calculated at

a quarterly rate of $8.80 per pole. On or about February 23, 2004, Waitsfield paid GMP for the First Quarter of 2004 a total of $15,622.00 for Waitsfield's attachments to 3,905 poles solely-owned by GMP and to 1 pole jointly-owned by GMP and WFTC, which WFTC calculated at a quarterly rate of $4.00 per pole for solely-owned poles and $2.00 per pole for jointly-owned poles (assuming two feet of occupied space per pole). Stip. ¶ 24, at 8.

(3) Champlain Valley Telecom and GMP

38. Champlain Valley Telecom, Inc., was incorporated in 1994 upon the acquisition by WFTC of certain Vermont assets of Contel of Vermont, Inc., d/b/a GTE Vermont ("GTE Vermont"). Stip. ¶ 25, at 9.

39. Champlain Valley Telecom, Inc., was the predecessor-in-interest to the portion of WFTC's corporate operations now doing business as Champlain Valley Telecom. Stip. ¶ 26, at 9.

40. By Order dated December 14, 1998, in Docket 6171, the Board approved the merger of Champlain Valley Telecom, Inc., with and into WFTC; the merger became effective at midnight on December 31, 1998. Stip. ¶ 27, at 9.

41. Prior to January 1, 1999, Champlain Valley Telecom and GMP executed between them a series of agreements to govern the terms, conditions and rates for Champlain Valley Telecom's attachments to poles owned wholly by or jointly with GMP. Stip. ¶ 28, at 9.

42. On March 3, 1997, Champlain Valley Telecom filed a complaint with the Board concerning the pole attachment charges levied by GMP; the Board opened an investigation into the complaint as Docket 5960. Stip. ¶ 29, at 9.

43. According to documents filed in Docket 5960:

a. In 1993, GMP charged GTE Vermont annual rent of $25.13 per pole for GTE Vermont's attachments on poles solely-owned by GMP and $12.56 per pole for GTE Vermont's attachments on poles jointly-owned by GMP and GTE Vermont. Stip. ¶ 30a, at 10.

b. Between 1994 and 1997, GMP charged Champlain Valley Telecom annual rent at an increasing rate for Champlain Valley Telecom's attachments to GMP poles. The number of poles and the rental rates that GMP charged to Champlain Valley Telecom for those years are as follows:

Year	Wholly Owned Poles	Rate	Jointly Owned Poles	Rate
1994	4,313	$ 26.46	52	$ 13.23
1995	4,311	28.42	52	14.21
1996	4,282	28.42	52	14.21
1997	4,365	31.14	56	15.57

Stip. ¶ 20b, at 10.

44. Because of similarities with the dispute at issue in Docket 5960, the Board conducted two investigations concurrently with Docket 5960: (1) in Docket 5961, the Board investigated a complaint by Champlain Valley Telecom against Vermont Electric Cooperative, Inc. ("VEC") concerning the pole attachment rates charged to Champlain Valley Telecom by VEC; and (b) in Docket 6096, the Board investigated a complaint by STE/NE Acquisition Corp., d/b/a Northland Telephone Company of Vermont and a/k/a FairPoint New England ("FairPoint"), concerning the pole attachment rates charged to FairPoint by GMP. On or about November 4, 1998, Champlain Valley, GMP, VEC, and FairPoint jointly entered into a Stipulation for Settlement and Dismissal (the "Stipulation") that was intended to resolve the disputes at issue in the consolidated Dockets 5960, 5961 and 6096. Stip. ¶ 31, at 10–11; exh. WFTC-7.

45. The Stipulation resolved the dispute between GMP and Champlain Valley Telecom with respect to attachment rates for calendar years 1994 through 1997, inclusive, on the basis of the rate that GMP invoiced to GTE Vermont in 1993, an annual rate of $25.13 for a solely-owned pole. Under the Stipulation, the parties agreed to be bound by the same rates for 1998 and 1999 unless the rates were modified by Board Rule on or before December 31, 1999. Stip. ¶ 32, at 11.

46. By letter dated November 23, 1999, from counsel for GMP to counsel for Champlain Valley Telecom and by letter dated January 4, 2000, from counsel for Champlain Valley Telecom to counsel for GMP, GMP and Champlain Valley Telecom agreed to continue the effectiveness of the Stipulation indefinitely during the pendency of the Board's consideration of a revised Rule 3.700. Stip. ¶ 33, at 11; exhs. WFTC-8 and WFTC-9.

47. On September 22, 2000, Champlain Valley Telecom received an invoice, dated September 19, 2000, for pole attachments for the year 2000 in the amount of $11,162.39, reflecting an annual rate per solely-owned pole of $25.13. Champlain Valley Telecom paid this invoice in full on December 27, 2000. Stip. ¶ 34, at 11; exh. WFTC-10.

48. Champlain Valley Telecom received an invoice dated December 6, 2001, from GMP for $113,109, reflecting an annual rate per solely-owned pole of $25.13 for the year 2001. Champlain Valley Telecom paid this invoice in full. Stip. ¶ 35, at 11; exh. WFTC-11.

49. Both Champlain Valley Telecom and GMP were active participants in the rule-making proceeding that resulted in the adoption of Revised Rule 3.700. Stip. ¶ 36, at 12.

50. During the pendency of the Board's Rule 3.700 rule-making, Champlain Valley Telecom continued to pay rent at the pole attachment rate set under the Stipulation. Stip. ¶ 37, at 12.

51. Calendar Year 2002: On January 28, 2003, Champlain Valley Telecom received an invoice from GMP for $126,536.41, reflecting a rate of $25.13 per pole for the year 2002. The invoice also included an $823 charge for 2002 permit activity. Stip. ¶ 38, at 12.

52. As described in the letter dated April 17, 2003, Champlain Valley Telecom paid GMP $89,305.12 for pole rentals for the year 2002, which Champlain Valley Telecom calculated using the rate from the Conditional Approval Order ($9.88 per foot of occupied space per pole). Champlain Valley Telecom paid the $823 charge for 2002 permit activity in full. Stip. ¶ 39, at 12; exh. JOINT-6.

53. Calendar Year 2003: By annual invoice dated February 3, 2004, GMP billed Champlain Valley Telecom a net total of $127,872.22, representing pole-rental fees on 5,018 poles solely-owned by GMP and on 9 poles jointly-owned by GMP, calculated at an annual rate of $25.13 per solely-owned pole ($12.565 per jointly-owned pole). On or about February 23, 2004, Champlain Valley Telecom paid GMP a total of $81,414.86 for Champlain Valley Telecom's attachments to poles solely- and jointly-owned by GMP, which Champlain Valley Telecom calculated using the rate from the GMP Approval Order ($8.00 per foot of occupied space per pole). Stip. ¶ 40, at 12.

B. Discussion

(1) The 1983 Waitsfield Agreement

WFTC contends that, by letter to GMP dated February 13, 2003, it terminated the 1983 Waitsfield Agreement, effective January 1, 2002.[16] WFTC concedes that the Waitsfield Agreement does not contain a termination clause, but asserts that there is also no express provision making the agreement perpetual or otherwise barring termination.[17] According to WFTC, the plain language of the Waitsfield Agreement makes clear that the parties considered their arrangement to be at-will, so that the lack of a durational term or a termination provision entitled either party to terminate the Waitsfield Agreement upon reasonable notice.

GMP argues that the Waitsfield Agreement, which contains no termination provision, is terminable only with the mutual assent of both parties, and that WFTC's unilateral attempt to terminate the Waitsfield Agreement is unavailing.

I am persuaded that the Waitsfield Agreement is terminable by either party, notwithstanding the lack of an express termination provision.

> Generally, an agreement without a fixed term of duration is terminable at the will of either contracting party . . . If there is nothing in the nature or the language of a contract for an indefinite period to indicate that it is perpetual, the courts will interpret the contract to be terminable at will.[18]

It is clear from the terms of the Waitsfield Agreement that the parties considered the 1983 writing to be both a partial reflection of their agreement — as evidenced by the explicit reference to the October 14, 1983, letter, which is missing from the record — and an interim arrangement, which would soon be replaced by "a more definitive contract" — although no such contract was apparently ever made.[19] The partial and interim nature of the Waitsfield Agreement manifests an understanding by the parties that the 1983 document was not intended to last for very long, and certainly not for more than 20 years.

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16. Exh. Joint-5; tr. at 41, lines 7–11 (Owen).

17. Tr. at 43, lines 8–13 (Owen).

18. 17B C.J.S. Contracts § 439; *see also Payroll Express Corp. v. Aetna Casualty and Surety Co.,* 659 F.2d 285, 291–92 (2d Cir. 1981) (public policy of avoiding perpetual contracts is limited to contracts having no termination provisions).

19. Exh. Joint-4, at 1.

The fact that the Waitsfield Agreement lacks both a duration and a termination provision underscores the conclusion that the agreement created an "at-will" arrangement, in which either party has an implied right to terminate the agreement upon reasonable notice.[20] This is particularly true where, as here, the party seeking to avoid termination was also the drafter of the agreement. It is axiomatic that contractual ambiguities arising by omission are strictly construed against the draftsman.[21] In this case, GMP cannot bind WFTC to a perpetual term simply because the language of the agreement is silent as to its duration and termination.

WFTC further contends that the termination of the Waitsfield Agreement be made effective as of January 1, 2002, which is the same date that the rate provisions of revised Rule 3.700 took effect, and the same date that GMP's tariffed rates from Docket 6609 took effect. WFTC argues that the Board's adoption of the revised Rule, and its approval of GMP's tariffed rates in compliance with that revised Rule, render the Waitsfield Agreement's much higher attachment rates void as against public policy, unconscionable as a matter of law, and in violation of principles of equity and competitive neutrality.[22]

I do not agree that the GMP rates are made void by the adoption of lower rates in the GMP tariff — higher rates are always possible in a contract. However, I do accept WFTC's argument that the contract with GMP is terminable by either party upon reasonable notice, and I accept that the February 13, 2003, letter was sufficient to terminate the contract as of that date. WFTC offered no explanation as to why it waited more than 13 months after the effective date of GMP's tariff to terminate the contract. In the absence of a strong showing that the delay was reasonable and that adherence to the contract rates would be unfair, I decline to accept WFTC's assertion that the termination should be retroactive.

I also accept WFTC's argument[23] that the contract with GMP was intended to include all the costs of pole attachments, including make-ready costs, and I conclude that GMP ought to be required to return these payments. It is unfortunate that WFTC did not include any information

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20. *Southern Bell Tel. & Tel. Co v. Florida East Coast Rwy.*, 399 F.2d 854, 859 (5th Cir. 1968) (where intent of parties as to duration of agreement cannot be determined with any certainty, the common law allows such contracts to be terminated upon giving reasonable notice).

21. *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 49 (1990).

22. Petition ¶ 78(a)(2), at 20–21.

23. *See* findings 22–25, above.

about the exact amount of payments it made under protest, other than to describe them as "hundred of thousands of dollars." However, this information should be available to both companies, and the Board can require them to make this calculation after the issuance of the final order.

(2) Champlain Valley Telecom Stipulation

WFTC also contends that the Docket 5960 Stipulation, which represents the most recent agreement setting an attachment rate for Champlain Valley Telecom's attachments to GMP's poles, should be terminated effective January 1, 2002. In WFTC's view, the clear intention of the stipulating parties was to have the stipulated attachment rate terminate upon the adoption of revised Rule 3.700.

However, GMP argues that revised Rule 3.700 fails to provide a clear method for calculating an attachment rate to be paid by an ILEC, and so the requirement, from the Stipulation, that the stipulated "rates, terms, and the methodology for computation of rates . . . be modified by a PSB Rule"[24] has not been satisfied.

I conclude that the attachment rate established in the Stipulation has been modified by revised Rule 3.700, and that the Stipulation has therefore been terminated as of January 1, 2002. Contrary to GMP's contention, the "rate, terms, and the methodology for computation of rates" in revised Rule 3.700 do apply to ILECs. The fact that one alternative means of calculating one element of the Rental Charge Formula established in Rule 3.706 — namely, the presumptive amount of Space Occupied by Attachment in Rule 3.706(D)(1)(b) — may exclude ILECs is not a basis to conclude that the new Rule's "rates, terms, and methodology for computation of rates" do not apply to ILECs. There are other methodologies for calculating attachments rates and terms for ILECs, such as the methodologies provided in Rules 3.704(C) and 3.706(A)(2).

The clear intention of the parties to the Stipulation was to adopt an interim attachment rate that would remain in force until such time as a new Board Rule was in place that would allow the parties to resolve their ongoing dispute over pole attachment rates. As the Board

24. Exh. WFTC-7, at 3.

acknowledged in its Policy Statement,[25] the Stipulation did not establish a stable agreement, but merely deferred a longstanding dispute until the Board could adopt Rules for setting a rental rate that is just and reasonable.

As the present proceeding demonstrates, the adoption of revised Rule 3.700 provides the framework for GMP and WFTC to have the Board set a rate that will resolve the parties' continuing dispute. Making that new rate effective as of January 1, 2002, merely places WFTC in the same position as any other Attaching Entity who had attachments on GMP's poles at the time revised Rule 3.700 took effect, while giving WFTC the benefit of the bargain it made when it entered into the Stipulation. Accordingly, as to pole attachment rates for the former Champlain Valley Telecom areas, the new rate established in this proceeding will take effect as of January 1, 2002.

C. Calculation of Pole Attachment Rate

(1) Findings of Fact

(a) General Facts

54. WFTC asks the Board to set a rate in this proceeding of $16.00 per pole per year, an amount equal to the so-called "two foot" rate applicable to Other Attaching Entities under GMP's approved tariff from Docket 6609. Owen pf. at 5, lines 10–14.

55. WFTC believes there is an open legal question as to whether ILECs can claim a 1-foot or 2-foot presumption of occupied space under Rule 3.700, but in this proceeding WFTC concedes that it will pay the higher (2-foot) rate to GMP in order to simplify matters and expedite the resolution of the present dispute. Owen pf. at 5, lines 7–10 and 14–17.

56. GMP asks the Board to set an attachment rate for WFTC of $29.53 per pole per year, which is the weighted average of the rate as set in the Waitsfield Agreement ($35.19) and the rate as set in the Docket 5960 Stipulation ($25.13). Ferguson pf. at 2, lines 15–19.

57. The proposed $29.53 rate is a blended rate that GMP would charge WFTC throughout the WFTC service territory, thereby eliminating the current disparity between the rental rate

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25. The Board also viewed the Docket 5960 Stipulation as settling the rental-rate dispute pending the outcome of the Rule 3.700 rule-making proceeding. *See* Policy Statement (exh. DPS-3), at 17 fn. 59.

charged to WFTC in Waitsfield Telecom territory and the rental rate charged to WFTC in Champlain Valley Telecom territory, and achieving revenue neutrality for both GMP and WFTC. Tr. at 84, lines 4–17 (Ferguson).

58. Although GMP testified that WFTC should bear 20.86% of GMP's pole costs, that percentage does not represent actual costs attributable to WFTC's attachments on GMP's poles, and instead simply represents the figure that, when applied to GMP's net pole costs, produces a $29.53 rate for purposes of revenue neutrality today. Tr. at 85, lines 7–10 and 23–25, and at 86, lines 1–6 (Ferguson).

59. If GMP had used different data inputs that produced a different amount for GMP's net pole costs, then GMP would simply have applied whatever allocation percentage would produce the same $29.53 rate for purposes of revenue neutrality. Tr. at 86, lines 10–17 (Ferguson).

60. Using figures from its 2003 FERC Form 1 to calculate its Net Investment Per Pole and its Carrying Cost Ratio, and using the combined results of a subsample of its poles (namely, poles 35 feet and higher) and a random sample of 200 of its poles to calculate an average amount of Total Usable Space, GMP has calculated a new so-called "1 foot" rate of $12.11 per pole per year, and a new so-called "2 foot" rate of $24.21 per pole per year. Ferguson pf. at 14, lines 23–24; exhs. GMP-BF-2 and GMP-BF-3.

61. GMP proffered four pole surveys for purposes of setting the rate in this proceeding: (1) a survey that includes all the poles in the GMP system, for purposes of calculating Net Pole Investment; (2) a survey that includes only poles 35-feet tall and taller, for purposes of calculating average pole height and average buried pole space; (3) a random survey of 200 poles statewide, for the purpose of calculating the average height to the lowest point of attachment; and (4) an informal survey conducted by GMP's witness, Mr. Ferguson, during a recent drive along certain roads in Waitsfield, for the purpose of estimating the amount of space actually occupied by WFTC on GMP's poles. Tr. at 49, line 25, and at 50, lines 1–12 (Owen).

62. WFTC contends that, in its use of multiple pole surveys to produce a rate calculation, GMP "shopped the surveys to pick the survey which best represents their needs depending on the situation," and that the result is akin to "comparing apples to oranges to bananas and pears." Tr. at 50, lines 18–20 and 25, and at 51, line 1 (Owen).

(b) Space Calculation

63. GMP has a total of 52,403 poles (wholly-owned equivalents) in its system. Exh. GMP-BF-2, at 8.

64. Of the total poles in GMP's system, 42,296 poles (wholly-owned equivalents) are 35 feet tall or taller. Exh. GMP-BF-3.

65. GMP conducted a study of all the poles in its system that are 35 feet tall or taller, on the premise that poles less than 35 feet in height would be unsuitable for telecommunications attachments. Ferguson pf. at 10, lines 8–10.

66. GMP tallied the total pole-feet and total feet-underground of all poles 35 feet tall or taller, and divided each tally by 42,296 to derive an average pole height of 39.13 feet, and an average amount of space underground of 6.11 feet. Exh. GMP-BF-3.

67. GMP used a random survey of 200 poles in its system and recorded the lowest actual attachment found on each of those poles, and derived an average height to the first actual attachment of 21.33 feet. Exhs. GMP-BF-3 and GMP-BF-4, at 6.

68. Taking the average pole height (39.13 feet) and subtracting the average amount of space underground (6.11 feet) and the average height to the first attachment (21.33 feet), GMP calculated an average amount of Usable Space of 11.69 feet. Exh. GMP-BF-3.

69. The random survey of 200 poles was taken statewide and therefore includes mostly poles located outside the WFTC service territory. Tr. at 123, lines 12–14 (Ferguson); exh. GMP-BF-3.

70. WFTC can describe its own customary practices and standards regarding attachment heights and the order of attachments, but has no knowledge of the practices and standards employed by other Attaching Entities outside the WFTC service territory. Tr. at 51, lines 2–17 (Owen).

71. WFTC believes that a pole survey that is intended to produce a rental rate for WFTC's attachments should be based only on GMP poles located within WFTC's service territory. Tr. at 33, lines 12–18 (Owen).

72. The GMP methodology, in its survey of 200 poles, involved calculating the point on each pole where the lowest attachment is actually attached. Tr. at 123, lines 16–19 (Ferguson).

73. GMP is not able to determine with certainty that the lowest actual attachment points on the 200 poles in its survey are also the lowest possible attachment points on those poles. Tr. at 127, lines 7–10 (Ferguson).

74. WFTC's practice is to attach its telecommunications facilities at the highest, rather than the lowest, possible attachment point on a pole, which is a point 52 inches below the electric company's attachment, taking into account the 40-inch required safety space below the electric company's attachment and an additional 12 inches of space to allow a cable television facility to be attached above the telephone facility. Tr. at 70, lines 4–18 (Owen).

75. A survey of usable space should measure to the lowest possible point of attachment, which is nowhere near where WFTC's facilities are attached. Tr. at 70, lines 24–24, and at 71, lines 1–6 (Owen).

76. GMP also conducted an informal survey of 250 poles along Route 100 in Waitsfield and along a "rural stretch" of the North Road, Joslin Hill Road, and Bridge Street in Waitsfield, near the Waitsfield Common, for the purpose of estimating the average amount of actual space occupied by WFTC's attachments. Ferguson pf. reb., at 4, lines 18–23; tr. at 130, lines 24–25, and at 131, lines 1–6 (Ferguson).

77. From its informal survey, it appeared to GMP that WFTC may actually use more space, on average, than the two feet that WFTC has accepted for the purpose of this proceeding. Ferguson pf. reb. at 5, lines 15–16.

78. GMP is unfamiliar with WFTC's service territory and so cannot say whether a survey conducted along Route 100 and on roads near Waitsfield Common is representative of the service territory as a whole. Tr. at 131, lines 7–12 (Ferguson).

79. Of the 200 poles in GMP's randomly selected survey, 64 of those poles have both a telephone company attachment and a cable television attachment. Tr. at 132, lines 23–25, and at 133, line 1 (Ferguson); exh. GMP-BF-4.

80. The space differential between a telephone attachment and a cable television attachment is a reasonable proxy for the amount of space occupied by a telephone attachment. Tr. at 134, lines 14–22 (Ferguson).

81. Of the 64 poles in GMP's random survey that have both telephone attachments and cable television attachments, the average space differential between the telephone attachment and the cable television attachment is 1.96 feet.[26] Tr. at 134, lines 23–24, and at 135, lines 1–4 (Ferguson).

82. The survey provided by GMP demonstrates that telephone facilities occupy less than two feet of space, on average, on GMP's poles. Tr. at 135, lines 8–11 (Ferguson).

(c) Calculation of Net Investment Per Pole

83. GMP determines its Net Investment Per Pole to be $315.51, which it calculates by dividing its Net Pole Investment ($16,533,737) by the total number of poles (wholly-owned equivalents) in the GMP system (52,403). Exh. GMP-BF-2, at 8.

84. GMP uses a different figure for net pole investment ($16,533,737) when calculating its net investment per-pole than the figure for Net Pole Investment ($15,594,796) that GMP uses for calculating the Depreciation Element of the Carrying Charge, with the difference being the amount of net investment in rights-of-way ($938,941). Exh. GMP-BF-3, at 6, 8.

85. The amount of GMP's Net Pole Investment includes the cost of appurtenances, such as cross-arms, that are not useful or necessary for attaching telecommunications facilities to poles. Tr. at 121, lines 2–7 (Ferguson).

86. GMP is aware that in the rule-making that produced revised Rule 3.700, as well as in several subsequent pole-attachment tariff proceedings, including GMP's own tariff proceeding in Docket 6609, there was significant discussion about the inclusion or exclusion of costs for appurtenances. Tr. at 121, lines 8–14 (Ferguson).

87. GMP is aware that the Federal Communications Commission "FCC" has established a presumption that 15% of the net pole investment of electric utilities is attributable to

26. Because of a transcription error, the transcript reflects an incorrect number of over a million feet.

appurtenances that are of no use to anybody other than the electric utility. Tr. at 141, lines 10–21 (Ferguson).

88. GMP did not in fact remove 15% of its Net Pole Investment from its rate calculation in this proceeding. Tr. at 141, lines 5–9 (Ferguson).

(d) Rental Rate Calculation

89. If the lower figure for net pole investment ($15,594,796) is used and that figure is then reduced by 15% to remove the cost of unnecessary appurtenances, then GMP's Net Pole Investment is reduced to $13,255,577, and after dividing by the total number of poles (52,403), the amount of Net Investment Per Pole is reduced from $315.51 to $252.95. Tr. at 129, lines 17–23 (Ferguson).

90. If the Rule 3.700 presumption of space above the ground to the lowest possible point of attachment (18 feet) is used instead of the average figure produced by GMP's survey of the lowest actual points of attachment in its 200-pole survey (21.33 feet), then the average amount of usable space on GMP's poles increases from 11.69 feet to 15.02 feet. Tr. at 129, lines 24–25, and at 134, lines 1–3.

91. Using a figure for Net Investment Per Pole of $252.95 and a figure for Usable Space of 15.02 feet, and disregarding any impact on the Carrying Cost Ratio, the new one-foot rate that GMP has calculated for this proceeding would decrease from $12.11 to $7.55. Tr. at 130, lines 4–7 (Ferguson).

(2) Discussion

(a) Rental Rate Calculation

In light of my earlier conclusion that both the 1983 Waitsfield Agreement and the Docket 5960 Stipulation have been terminated, I must now set a rate for WFTC's attachments to GMP's poles. Two provisions of the Rule are relevant to setting the rates.

First, Board Rule 3.704(C) provides that, when a pole-attachment contract has expired and the parties cannot reach agreement on a new rate, the Board must set a rate, and in so doing, "may consider the terms and conditions of previous contracts between the parties and the rental

calculation in section 3.706." The language of this Section makes consideration of both the previous contracts and the Rental Charge Formula discretionary for the Board. Second, Board Rule 3.706(A)(2) provides that when an ILEC cannot reach agreement on a rental rate with a Pole Owner, the Board must set a rate, and in so doing, "may consider the terms and conditions of any previous attachment or joint-use contracts between the parties in setting a rate not inconsistent with the principles of this Rule." In this Section, consideration of the previous contracts is discretionary, while "setting a rate not inconsistent with the principles of this Rule" is mandatory.

For several reasons, I see no basis for assigning any weight to the contractual rates that WFTC has been paying to GMP under the prior agreements. First, the plain language of both sections of the rule make such considerations discretionary. In light of the contentious results of the prior contractual arrangements, and the fact that the rates set out there far exceed the rates in the Board rule without any apparent reciprocal benefit to WFTC, I conclude that the rental rate proposed by GMP is not justified by GMP's costs and that it causes an unjust and inequitable burden upon WFTC. While Sections 3.704(C) and 3.706(A)(2) seem to apply, those sections were designed for a case where a very large telephone company (e.g., Verizon) that has, for many years, had elaborate pole-sharing and mutual support arrangements with the electric utilities, might decide to abandon those arrangements and seek rates under the Rule. In such a case it seemed prudent to provide some flexibility in the Rule so the Board is not straight-jacketed, but can look to the total economic relationship between the parties. That is clearly not the case here, and Sections 3.704(C) and 3.706(A)(2) have no application. Accordingly, I conclude that the appropriate basis for setting a rate in this proceeding is the Rental Charge Formula in Rule 3.706(C).

WFTC seeks attachment to GMP's poles at the higher of the two rates that GMP has tariffed, and which the Board has approved, in Docket 6609. In that Docket, the parties stipulated, and the Board held, that GMP's tariffed attachment rates are just and reasonable and consistent with the principles of Rule 3.700.[27] The higher tariffed rate, which GMP established for all Attaching Entities that are not ILECs, electric utilities, or cable television service

27. *See* finding 15, above.

providers not providing local exchange telephone service, is presently tariffed at $16.00 per pole per year.

In response, GMP has presented an updated rate calculation, based on its most recent FERC account figures and on the results of various pole surveys, that produces a one-foot attachment rate of $12.11 and a two-foot attachment rate of $24.21, using the Rental Charge Formula in Rule 3.706(C). These rates could presumably apply to any Attaching Entity that met the prerequisites for using one of the presumptions of Space Occupied by Attachment established in Board Rule 3.706(D)(1)(b). However, GMP asserts that WFTC, as an ILEC, is not eligible for either of those occupied-space presumptions, and so instead of recommending adoption of either of its per-foot calculated rates, GMP recommends that the Board establish a rate of $29.53 per pole per year for WFTC's attachments.

GMP contends that "revenue neutrality," meaning an outcome that results in no change in revenues or expenses for either GMP or WFTC, should be a guiding principle of the Board's determination in this Docket. To achieve the revenue-neutral rate of $29.53 for WFTC, GMP undertook an exercise that resulted in 20.86% of GMP's pole costs in the WFTC service area being attributed to WFTC's pole attachments. Multiplying GMP's net pole investment by this percentage produces the $29.53 rate. On cross-examination, however, GMP acknowledged that the 20.86% figure does not represent the costs that are properly attributable to WFTC's pole attachments, and instead simply represents the percentage that, when multiplied by net pole investment figures in GMP's 2003 FERC Form 1, produces the "revenue neutral" rate of $29.53.[28] This rate, while purportedly grounded in the updated investment and depreciation calculations presented by GMP, is actually nothing more than the weighted average of the two previous attachment rates that GMP has been charging to WFTC, respectively, in the Waitsfield service area ($35.19 per pole per year) and the Champlain Valley Telecom service area ($25.13 per pole per year). If the data inputs were different and produced a different amount for GMP's

28. *See* finding 58, above.

net pole costs, then GMP would simply derive a different allocation percentage that would produce the same $29.53 rate for purposes of revenue neutrality.[29]

I recommend that the Board, in setting a rate in these circumstances, be guided by the principle of a non-discriminatory right of access for all Attaching Entities.[30] One measure of this principle is the extent to which pole-attachment rates are competitively neutral.[31] But the fundamental purpose for which the Board undertook its revisions to Rule 3.700 was to establish a non-discriminatory right of attachment for all Attaching Entities, including ILECs and electric utilities, at rates that fairly compensate the pole-owning utility.[32]

The Board did not undertake the Rule revisions with a desire or purpose to achieve revenue neutrality. Indeed, the Board expressly acknowledged that "[t]he effects of this [Rule] change will in most cases reduce revenues to pole-owning utilities. . . ."[33]

GMP's proposal to keep its pole-rental relationship with WFTC "revenue neutral" would leave WFTC in a position no better than it was under the previous contracts, when WFTC was paying the highest attachment rates charged by GMP and among the highest attachments rates charged anywhere in Vermont. I have already concluded that the previous contracts produced an inequitable result for WFTC. In addition, GMP's proposal would place WFTC at a significant competitive disadvantage relative to competitive carriers who attach to GMP's poles. Furthermore, the evidence shows that this rate is significantly higher than GMP's tariffs, which are cost-based. There has not been convincing evidence that would show that WFTC should be charged for more (or less) than the default two feet of space. Accordingly, I recommend that the Board reject GMP's proposal to set a rate of $29.53 per pole per year for WFTC's attachments to GMP's poles, and require that GMP charge the two-foot rate tariffed for non-cable Attaching Entities, presently $16.00 per pole per year.

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29. Finding 59, above.

30. Board Rule 3.707(A).

31. *See* Policy Statement (Exhibit DPS-3), at 7 (acknowledging the need for competitive neutrality in pole attachment rates).

32. *See id.*, at 17 (The Board is not bound by federal-law limitations on access by ILECs or electric utilities, and the revised Rule 3.700 creates a right of attachment in both cases).

33. *Id.*, at 1.

That rate was a bottom-line settlement, so the exact parameters of its calculation are not in evidence. However, I believe it is worthwhile, for the guidance of these and other parties, to discuss what I believe to be several errors in the methodology used in proposing rates in this case. In particular, I recommend that the Board settle the following points of dispute; each of these points was discussed at length in the Board's rule-making, and neither of them ought to come as a surprise to the various parties:

1. The measure of unusable space in Section 3.706(D)(2)(b) was intended to mean, and should be, the clearance above ground below the first possible attachment point, "possible" meaning in compliance with applicable law, rules, electric codes, and utility standards of construction. The evidence was very clear during the rule-making that telephone cables are, as a rule, attached above the lowest legal point. The issue here is "usable space," and all the legal space is usable.

2. The study of pole heights in Section 3.706(D)(2)(a) was intended to mean a study of all poles owned by the utility, not only those to which a particular entity is attached. The rule clearly requires the pole-owner to have a single, per-foot, rate for attachment, not a different rate for each attacher. In this case GMP eliminated poles less than 35 feet from its calculations, and I have no opinion whether that exclusion was necessary; but a reasonable study of pole heights should include a statistically meaningful sample of poles owned by the company; 200 poles out of 42,000 seems a very small sample. And an informal survey, conducted during a drive-by on a few roads in the WFTC territory, cannot be seriously considered as evidence in a rate-setting proceeding.

(b) Refund Amount

The parties have stipulated to the amounts that WFTC has paid to GMP since January 1, 2002. However, at least one additional quarterly invoice and payment have been sent since the inception of this proceeding. I concluded earlier (see pages 18–19) that the Waitsfield Agreement was terminated as of February 13, 2003, while the Champlain Valley Telecom stipulation terminated on January 1, 2002. In addition, I concluded (see page 18) that GMP ought to return amounts for make-ready paid by WFTC under protest, offset by any amounts owing for the

period from January 1, 2002, through February 13, 2003, when WFTC may have paid the $16.00 rate per pole instead of the contractual rate. Since none of these amounts is clearly in the record, I ask WFTC, as part of any comments it may have to this Proposal for Decision, to submit the full amount of the refund to which it believes it is entitled under this proposed decision. In addition to any comments GMP may have on the Proposal for Decision, GMP will have 10 days from the date on which WFTC submits its refund calculation to contest the amount calculated thereby.

(3) GMP Tariff Defects

In compliance with the GMP Approval Order in Docket 6609, GMP filed two separate pole-attachment tariffs, one for Cable Television Companies (so long as the Cable Television Company does not use its attachments to provide local exchange telecommunications service), and the other for Attaching Entities, Excluding Incumbent Local Exchange Carriers, Electric Utilities and "Cable Attachments" of Cable Television Operators. Neither of the GMP pole-attachment tariffs establishes rates, terms or conditions for attachments by incumbent local exchange carriers, even though ILECs are defined to be "Attaching Entities" in Rule 3.700.[34]

WFTC now contends that GMP's pole-attachment tariffs, which were submitted and approved in Docket 6609, violate revised Rule 3.700 because the tariffs fail to provide rates, terms and conditions of attachment for a category of Attaching Entities, namely, ILECs such as WFTC. WFTC therefore asks the Board to require GMP to file pole-attachment tariffs that provide appropriate rates, terms and conditions of attachment for all Attaching Entities that have a right of access to GMP's poles.

Five provisions of the revised Rule are at issue here: Rules 3.701(A), 3.703(A), 3.703(B), 3.706(B) and 3.707(A).

Rule 3.701(A) provides as follows:

> This Rule governs the attachment of lines, wires, cables, or other facilities by any Attaching Entity seeking to attach to a pole owned by a Pole-Owning Utility, at rates, terms, and conditions that are just and reasonable.

34. Board Rule 3.702(B).

Rule 3.703(A) and (B) provide as follows:

> (A) Each Pole-Owning Utility shall file a pole attachment tariff with the Board. The tariff shall include rates, terms, and conditions governing attachment to poles and rights-of-way in which the Pole-Owning Utility has an ownership interest.
> (B) The tariff may incorporate a standard contract or license for attachments, so long as it is available to any Attaching Entity within the scope of this Rule and its provisions are not contrary to the provisions of this Rule.

Rule 3.706(B) provides as follows:

> (B) Single Rate. Each Pole-Owning Utility shall calculate a single pole rental rate and shall include that rate in its pole attachment tariff.

Finally, Rule 3.707(A) provides as follows:

> Right of Access. A Pole-Owning Utility shall provide all Attaching Entities non-discriminatory access to any pole, support structure, or right-of-way in which it has an ownership interest.

The foregoing provisions of the revised Rule impose an obligation on a Pole-Owning Utility to provide non-discriminatory access to its poles to all Attaching Entities under the Rule. The Board's Policy Statement accompanying the revised Rule makes clear that ILECs such as WFTC now have a legal right to attach to a Pole-Owning Utility's poles.

The provisions of the revised Rule governing tariffs do not make any exception that would exclude ILECs from a Pole-Owning Utility's tariffs. Indeed, Rule 3.703(B) states that a tariff may incorporate a standard attachment agreement, but only if that agreement "is available to any Attaching Entity within the scope of this Rule," which would plainly include ILECs. The clear implication of Rule 3.703(B) is that, for a standard agreement to be incorporated into a pole-attachment tariff, the standard agreement must be made available on the same basis as the tariff is made available, i.e., "to any Attaching Entity within the scope of this Rule." There is no provision in the Rule that allows a Pole-Owning Utility to exclude an entire category of Attaching Entities from the Pole-Owning Utility's pole-attachment tariff. Such an exclusion runs afoul of the Pole-Owning Utility's independent obligation, under Rule 3.707(A), to "provide **all Attaching Entities** non-discriminatory access to any pole, support structure, or right-of-way in which it has an ownership interest" (emphasis added).

In the present matter, GMP has filed two separate tariffs, even though GMP acknowledges that each tariff merely relies on the presumption of occupied space established in Rule 3.706(D)(1)(b).[35] The plain language of the Rule 3.706(B) requires a Pole-Owning Utility to calculate a **single pole rental rate** and to include that rate in its tariff. GMP concedes that it could have filed a single tariff stating a single per-foot rental rate, instead of filing two separate tariffs that included certain Attaching Entities and excluded others.[36]

I conclude that GMP has not met its obligation to file a single pole rental rate and to provide non-discriminatory access to all Attaching Entities. The GMP tariffs are not available to any Attaching Entity within the scope of the revised Rule, and as such infringe on the right of attachment that the revised Rule grants to WFTC and other ILECs.[37]

Accordingly, I recommend that the Board require GMP, within 45 days from entry of a Final Order in this Docket, to amend its existing pole-attachment tariffs to provide rates, terms and conditions of attachment to all Attaching Entities within the scope of revised Rule 3.700. Whether GMP files a single tariff with a per-foot rate applied to various types of attachments or two tariffs, one for each type (one foot or two foot) is of little consequence; but the tariff must deal, in a non-discriminatory manner, with ILECs that do not have a special contract for pole attachments.

III. ADDITIONAL DISCUSSION

All of the parties to this proceeding filed comments on the August 25, 2004, Proposal for Decision; some of the comments were supportive, others thought that I had made errors of fact and law. In response I have made several changes to the Proposal, and have circulated the revised text to the parties for further comment. In this section, I will describe the changes I have made and discuss my reasons for accepting or rejecting the various comments.

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35. Finding 17, above.

36. Finding 18, above.

37. The GMP tariffs are also not available to electric utilities, although the issue of one electric utility seeking attachments to poles owned by another electric utility raises additional questions that are not presented in this proceeding.

Department of Public Service

The Department's comments were generally supportive. Most of the comments support my discussion of calculation methodologies at page 29. Since that discussion was not essential to the decision in this docket, it is basically *dictum*, and so there is no point in trying to fine-tune the issues (although I have reversed two positions, as noted below).

Waitsfield-Fayston Telephone Company, Inc.

WFTC argues that it should be charged a rate based upon the usable space on poles in its service territory, not all the poles in GMP's territory. Here again, this docket did not involve a recalculation of the parameters in GMP's tariff, so details of calculation methodologies are moot. However, I continue to believe the Board will eventually conclude that pole surveys should include the entire territory of the pole owner.

WFTC also seems to believe that I did not rule on its argument that the Board's adoption of Rule 3.700 rendered the rate that GMP was charging WFTC under the 1983 agreement unconscionable and void as against public policy. On the contrary, I believe that I did reject that argument. See page 18, above.

While WFTC continues to argue that I have used an incorrect starting date for make-ready refunds, an argument I reject, it does correctly state that my refund recommendation applies equally to both the Waitsfield and Champlain Valley accounts, although the details of the amounts and their timing will, of course, vary.

Finally, as WFTC notes, my request for a calculation of a refund amount on page 30 of the original Proposal for Decision was for a simple accounting, not an invitation to reopen the record to contest the circumstances of the payments. My understanding of WFTC's refund calculation is as follows:

Pole attachment charges	$ 15,537.59
Make-ready charges	386,934.10
Total	$402,471.69

GMP

GMP raises several objections. It calls the Proposal's treatment of the rates "retroactive ratemaking," but this distorts the meaning of my Conclusions 2 and 3. GMP has had a rate of $16 for a two-foot attachment since January 1, 2002; all the Proposal does is find that, when the contracts were terminated, the proper rate to be applied is the two-foot rate. This is not what is meant by "retroactive ratemaking."

GMP objects to the Proposal's refund of make-ready charges on the basis that the Board lacks jurisdiction to order such a refund, citing *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1 (1941). I do not believe that *Trybulski*[38] applies in this situation. First, resolution of the make-ready issue is closely tied to the pole attachment rate issue, and its resolution is a reasonable, ancillary, extension of the rate issue. Further, judicial efficiency is promoted by determining the issue, since it had already been heard. And where Trybulski was an action in tort that happened to involve a utility company, the make-ready issue arises from a dispute over rates charged by one regulated utility company to another, both of them under the Board's general supervision.

CVPS

CVPS filed comments on my four policy recommendations on page 29. I am sorry to report that I was probably wrong on two of those recommendations, and I have removed them. First, I opined that right-of-way acquisition costs ought not to be included in pole costs for the rental calculation under the Rule. As CVPS points out, the Board, in comments to the Legislative Committee on Administrative Rules, stated that if, as appeared to be true, land costs are included in the telephone company pole-cost accounts used under the FCC's rule, then, in the interest of being even-handed, they would be allowed in the electric company calculations also. There is no reason to think the Board would retreat from this position. Second, as CVPS notes, the Board took out of the rental calculation the FCC's reduction of pole costs for appurtenances.

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38. In *Trybulski,* the Court upheld a decision by the Public Service Commission that dismissed a suit against a dam operator for damages to land caused by flooding. The Court held that adjudging liability on a claim of negligence, as well as determining the effect of several statutes, were "judicial functions and not reasonably necessary or incidental to the carrying out of an executive . . . function." *Trybulski* at 120–121.

While I may think the Board ought to revisit that decision some day, I agree with CVPS that *dictum* in a case with no evidence or argument on the subject is not the place to do it.

IV. CONCLUSION

Based upon all the evidence reviewed and weighed herein, to establish a just and reasonable rate, I recommend that the Board:

1. Set an annual rental rate of $16.00 (its tariffed rate for a two-foot attachment) for all of WFTC's attachments to poles owned by GMP.

2. Make the $16.00 rate effective as of January 1, 2002, for the Champlain Valley Telecom area poles, and February 13, 2003, for the Waitsfield area poles.

3. Order GMP to refund an amount, to be calculated by WFTC and approved by the Board, representing overpayments of rent and make-ready made by WFTC to GMP, offset by any underpayment of rent from January 1, 2002, through February 13, 2003.

4. Order GMP to amend its existing pole attachment tariffs to grant non-discriminatory access to all Attaching Entities in Vermont.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 5th day of November, 2004.

s/John P. Bentley
John P. Bentley, Esq.
Hearing Officer

V. BOARD DISCUSSION

The Board heard oral argument in this docket on November 19, 2004. In large part, we accept the Findings and Conclusions of the Hearing Officer. We agree that this Board has jurisdiction over the matter of payments made by WFTC and Champlain Valley Telecom to GMP as make-ready charges. Those charges, while arguably made under a contract (or, as WFTC would argue, in breach of a contract), were rates for services provided by one regulated utility to another. Further, we believe the Board's records will demonstrate that WFTC was unhappy for many years about these charges, but refrained from vigorously pursuing a remedy because of the pendency of the Board's rulemaking on pole attachments. Following those conclusions, we confirm that GMP ought to refund the sum of $402,471.69; this sum appears to be the total owed with respect to both service territories.

We also agree that GMP should charge a rental rate of $16.00 for all of WFTC's attachments to poles owned by GMP, and that GMP should file an amended tariff to that effect.

Finally, the Hearing Officer initially made several policy recommendations on methodology for determining rate base parameters in the pole attachment calculation. In his revised proposal for decision he stepped away from some of those recommendations, but left two. It is true that neither of the remaining recommendations is necessary for deciding this case; however, it is worth addressing them briefly, to avoid needless litigation in the future. First, we agree that the measure of unusable space in Section 3.706(D)(2)(b) was intended to mean, and should be, the clearance above ground below the first possible attachment point, "possible" meaning in compliance with applicable law, rules, electric codes, and utility standards of construction. Unusable space should not be determined by the height at which the lowest attachment happens to be made on a particular pole. Second, we agree that, where the Rule calls for surveys of pole heights, we intend those surveys to be statistically valid, not informal viewings. Finally, on one of the recommendations that was subsequently removed, we note that it may be difficult to achieve equal treatment of electric and telephone company pole costs through contested cases that will normally include only one utility type at a time. Even in the present docket, there would have been no reason to examine WFTC's pole ownership costs, assuming WFTC owns any poles. We will, therefore, consider holding a workshop where the

exact accounting treatment for various costs (as required by the FCC and FERC) can be examined and an equal treatment can be determined.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont that:

1. The Findings and Conclusions of the Hearing Officer are adopted.

2. Green Mountain Power Corporation ("GMP") shall implement an annual rental charge of $16.00 (the tariffed rate for a two-foot attachment) for attachments by Waitsfield-Fayston Telephone Company, Inc. ("WFTC"), to poles owned by GMP.

3. Green Mountain Power Corporation shall refund the sum of $402,471.69, representing overpayments of rent and make-ready paid by WFTC to GMP.

4. Within 45 days of the entry of this Order, GMP shall file a tariff revision amending its existing pole-attachment tariffs to provide for non-discriminatory access to its poles by all Attaching Entities in the State of Vermont.

Dated at Montpelier, Vermont, this 3rd day of February, 2005.

s/Michael H. Dworkin)
)
) PUBLIC SERVICE
)
s/David C. Coen) BOARD
)
) OF VERMONT
s/John D. Burke)

OFFICE OF THE CLERK

FILED: February 3, 2005

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.